IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

IN RE: Case No. 16-10015

SOUTHERN INYO HEALTHCARE DISTRICT Chapter 9

Debtor.

BEFORE THE HONORABLE FREDRICK E. CLEMENT

BANKRUPTCY JUDGE

APRIL 10, 2019

Proceedings recorded by electronic sound recording.

A P P E A R A N C E S

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I N D E X

16-10015

THE COURT: I'll take all appearances, starting with those in the courtroom first. For Southern Inyo Healthcare District for both matters, please.

MR. BEDOYAN: Good afternoon. Hagop Bedoyan on behalf of the main status conference.

THE COURT: Just the status conference?

MR. BEDOYAN: Yes, Your Honor.

MR. KRUEGER: Good afternoon, Your Honor. Brandon Krueger on behalf of moving parties HCCA and VI Healthcare.

MS. MCDOW: Good afternoon, Your Honor. Ashley McDow, Foley & Lardner, on behalf of the Debtor and -- the Debtor in both -- both matters, Your Honor.

THE COURT: Very well. Good afternoon.

I'll take the appearances on the phone.

MR. WALTER: Good afternoon, Your Honor. Riley Walter.

THE COURT: I have Mr. Walter. Go ahead.

MR. WALTER: Your Honor, Riley Walter, appearing on behalf of Tulare Local Healthcare District, and I am monitoring both matters.

THE COURT: Just monitoring?

MR. WALTER: As for the status conference, I may have comments.

THE COURT: Okay.

MS. CONCHERAS-MARTINEZ: Your Honor --

MR. SHINBROT: And may it please the Court. I'm -- I'm sorry. Go ahead, ma'am.

MS. CONCHERAS-MARTINEZ: No problem.

Carmen Concheras-Martinez, Your Honor, on behalf of Creditor Integrity Healthcare. Listen-only on the status conference.

THE COURT: Okay.

MR. SHINBROT: And finally, Your Honor, Jeffrey Shinbrot. I am Southern Inyo Healthcare District special litigation counsel in connection with the HCCA matter. I am here to monitor the status conference and possibly to respond to any comments of Mr. Walters.

MS. WILLIAMS: Good afternoon, Your Honor. Latonia Williams on behalf of Optum Bank, Inc., monitoring both matters.

MR. SIMS: And good afternoon, Your Honor. Gerald Sims, also on behalf of Optum Bank, monitoring these matters.

THE COURT: Very well. With respect to the

motion to disqualify, which I'm going to call first, I think the only speakers would be Ms. McDow and Mr. Krueger; is that right?

MR. KRUEGER: I believe so, Your Honor.

THE COURT: Anybody else going to be heard?

MS. MCDOW: Not that I'm aware of, Your Honor.

THE COURT: Okay. I'm going to take the motion to disqualify first. I will hear first from Mr. Krueger, then from Ms. McDow. I may or may not take a reply. Mr. Krueger, no need to talk about the double imputation problem -- the citation to the motion, the -- to the record that I gave in the motion to quash. I have reviewed your -- well, Mr. Bedoyan's, actually -- supplemental brief at the end of January. And he's correct. I -- that was an incorrect reference on my part. Thank you for correcting me. But no need to argue it because I agree.

Mr. Krueger, go ahead.

MR. KRUEGER: Your Honor, at the outset, I would like to note that in a disqualification motion, we do not waive the prejudice or alleged prejudice to the client who may lose counsel. You don't do that at the outset. You do that only later

if you have made a finding that there has been extreme delay. And I'll reach that in a moment.

The parament concern -- and this comes from People Ex. Rel. Department of Corporations versus SpeeDee Oil Change Systems, Inc. The quote is: "The parament concern must be to preserve the public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process."

Here, we have a great deal of undisputed facts, and the most salient of which are that Attorney McDow had a personal attorney-client relationship with HCCA and that she personally performed substantial services for HCCA. In the invoices that have been submitted to the Court under seal, we see that Ms. McDow billed HCCA 37.2 hours on the Inyo MSA agreement, and with respect to this very Chapter 9 proceeding, providing advice regarding HCCA's rights and options with respect to this very Chapter 9 proceeding. And that is in advance of the filing of this Chapter 9 proceeding.

Her services included the drafting and negotiation of the Inyo MSA on behalf of HCCA.

Inyo, at that point, was represented by its own independent counsel. The MSA governed the relationship between Inyo and HCCA, and imposed upon HCCA responsibility for supervision of these very Chapter 9 proceedings for Inyo.

After the Chapter 9 was filed, Ms. McDow continued to have direct and confidential communications with Dr. Benzeevi and HCCA regarding these proceedings, and also communicated with HCCA's main counsel at the Baker firm, Bruce Greene.

We see that in the additional invoice, what we call the Chapter 9 invoice -- it's Exhibit PP -- which we also filed under seal, which shows that when the Chapter 9 was filed, Ms. McDow's role as counsel for HCCA didn't actually change. She just started billing her time and recording it in a different matter number to Inyo. But she was still having conversations with Baker and her client, Dr. Benzeevi and HCCA, about this very Chapter 9 proceeding, and with respect to the MSA that runs through this Chapter 9 proceeding.

Ms. McDow obtained confidential and client information from HCCA relating to both the Inyo MSA and this Chapter 9 proceeding. We know that based upon several things. Dr. Benzeevi has filed a

declaration averring that, that occurred. The invoices under seal show numerous communications between Ms. McDow and Mr. Benzeevi and Mr. Greene, including before and after the filing of the Chapter 9 proceeding. And the so-called waiver letters, the conflict waiver letters that were executed between 6:06 (audio glitch) and the Benzeevi Group -- they expressly state that Baker has obtained confidential client information.

Ms. McDow worked closely with Bruce Greene in relation to HCCA and -- and Inyo, both before and after the MSA was signed, and both before and after these proceedings commenced.

So what we have here is actual receipt of confidential information and all the necessary predicates for presumed receipt of confidential information.

Now, after a decade-long attorney-client relationship, where Baker represented the Benzeevi Group -- Dr. Benzeevi individually, HCCA, VI Healthcare, and other related entities -- in all manner of activities, the Baker firm fired HCCA approximately two weeks before Ms. McDow made an all-out frontal assault on the very contract that she had drafted and negotiated for HCCA, the

management services contract with Inyo. Neither Baker nor Ms. McDow obtained the moving parties' advanced or contemporaneous consent to represent Inyo in direct adversity to HCCA in relation to Inyo MSA.

There has been no screening with -- between Ms. McDow and Foley or anyone else. And you'll notice that the entire opposition filed by Debtor makes no argument that screening has occurred. There are many arguments of a very creative approach that is not recognized in law, which I would call sort of a "voluntary partial self-disqualification," where Ms. McDow advises the Court as to numerous matters where she has voluntarily said she will not be involved in the representation.

But that's not the same as screening. Screening has very stringent standards under the Rules of Professional Conduct and under Kirk versus First American Title. None of those standards are even approached, and Debtor doesn't even allege that they are.

Ms. McDow continues to be lead counsel for Inyo in this Chapter 9 proceeding, where Inyo is indisputably adverse to the moving parties in numerous regards. And she has been lead counsel for

Inyo adverse to my client when she was with the Baker firm, and continues with the Foley firm.

She continues to take adverse action HCCA beyond the emergency termination motion. Now, the emergency termination of the MSA -- the motion and Ms. McDow's declaration -- is a truly egregious and rare example of side-switching and of breaching the duty of loyalty. Very rarely do you see such a powerful example of an attorney making negative arguments and statements about a former client who was a present client just two weeks earlier.

And the harm that was suffered by HCCA is obvious. You know, that -- that management service contract was an important document and revenue stream for HCCA. And Ms. McDow, even though she had helped draft that contract on behalf of HCCA, attacked that contract.

Now, since that time, and even since independent counsel was brought in for the adversary action, Ms. McDow continues to take adverse action against HCCA, including making negative comments about HCCA in proceedings before this Court. And I would direct the Court's attention to the August 29 hearing, where Ms. McDow asked this Court to order the parties to mediation, in which she made numerous

negative statements about her former clients, accusing them of bad faith, accusing them of failing to provide information as necessary, accusing them of slowing down the bankruptcy proceeding.

Ms. McDow has stated on the record that a successful plan of adjustment here dependents on the resolution of multimillion claims between Inyo, HCCA, Vi Healthcare, and Tulare. And I'll remind the Court that Tulare is another of Baker and -- of Baker's former clients. And Ms. McDow was also personally involved in the drafting and negotiation on behalf of HCCA of the contract with Tulare. Tulare's a Creditor in this action as well. The Inyo MSA remains relevant to all of these disputes and directly relevant to the mediation.

I will also remind the Court that on August 29, at the hearing, Ms. McDow informed the Court that she had reached out to Baker, her former firm, about participating in the global mediation. That's an extraordinarily conflicted position when we realize that it is Ms. McDow's former firm, against whom Tulare has claims. The moving parties have claims, potentially Inyo has claims. And Ms. McDow, at that point, had not said she would not be involved in the mediation, but she was going to

bring in BakerHostetler as a potential participant and potential contributor in that mediation.

I'll note that the -- there's no plan on file at present. But the previously filed and withdrawn plans call for massive discounts of my client's creditor's claims -- administration claims against the district and collection of millions of dollars from my client -- from my clients on the adversary action.

We are told now in the opposition, for the first time, that the current plan requires no such contribution, or contemplates no such contribution, which I find somewhat surprising because I'm not aware of any current plan on file.

And the duty of undivided loyalty cuts in both directions here. Ms. McDow is now saying that she won't be involved. There's a whole heading in her brief that says Ms. McDow and Foley will not be involved in any matters adverse to HCCA. One could ask how that benefits the district to have its general insolvency counsel not interested in all potential avenues of funding, including -- notably missing from the now-withdrawn plans that were submitted -- there's no mention of potential recovery from Baker. And I find that to be a

potentially troubling conflicted position as well.

Here we have at least five different bases for the disqualification of Ms. McDow and, by imputation, of Foley. The violation of the duty of loyalty. In the opposition, Debtor has argued that there's no continuing duty of loyalty once a reputation ends, and to arrive at that argument, the Debtor cites to an unpublished decision. That's a complete -- a statement completely contrary to all of California law, established by the California Supreme Court.

We've got the Oasis West Realty versus Goldman case. We have the Wutchumna Water District case -- California Supreme Court decisions that expressly affirm the continuing duty of loyalty. And it's further confirmed in the New Rules of Professional Conduct, Rule 1.9, which does apply here because we are talking about an ongoing conflict after that new rule has come into effect.

That rule expressly discusses the continuing duty of loyalty. An attorney is forever forbidden either anything contrary or harmful to a client in a matter in which he or she has previously represented the client or from using a client's confidential information against him or her. So

that's the first basis for disqualification.

The second is the hot potato rule. The Court astutely noted the timing of the precipitous dropping of a long many-year relationship between Baker and the Benzeevi Group coming only two weeks and a few days before directly -- direct adversity in the filing of the emergency motion to terminate the MSA.

Dr. Benzeevi was unrepresented -- HCCA was unrepresented at that hearing. Their long-term counsel had just dumped them. It is a textbook example of the hot potato rule.

In opposition, the Debtor argues that, well, it's not a contemporaneous or a concurrent representation because we had previously commenced the termination of our representation of the Benzeevi Group. But that's how -- that's how a hot potato violation always occurs. It is the expedient termination of one client, so you can represent another client adverse to your former client. And it is viewed under the concurrent client conflict paradigm, and disqualification is automatic under the hot potato rule.

Here, we also have side-switching. Representing two successive clients with a conflict

in the same subject matter requires mandatory disqualification.

And here, we have Ms. McDow representing HCCA, with respect to the MSA, switching sides to attack that very MSA, representing HCCA with respect to the Chapter 9 proceeding, and then switching sides to represent Inyo adverse to HCCA in the Chapter 9 proceeding.

And we have Ms. McDow's own declaration in support of the opposition brief, stating that she provided legal services regarding MSA and regarding this Chapter 9 proceeding to HCCA, as all the invoices filed under seal make expressly clear.

This brings me to another basis for disqualification, which is application of the substantial relationship test. Representing two successful clients who have a client in matters that are substantially related in such circumstances, receipt of relevant confidential information is presumed, and disqualification is mandatory. Here, we have a substantial relationship between the representation related to the MSA and the MSA in -- the MSA's relevance in this bankruptcy proceeding.

Then we can see that -- and the Rutter Group talks about a substantial relationship means a

rational link between the two matters. And it's clear that the MSA is rationally linked to the Chapter 9 proceeding. Motions were filed in the Chapter 9 proceeding regarding the MSA. The MSA is still directly relevant to the adversary action -- HCCA and VI's administrative claims -- and it will be relevant to Tulare claims. Ms. McDow is a witness, a percipient witness, in all of that with respect to the contracts at issue.

Finally, possession of relevant confidential information. Receipt of information from the former client relevant to the subject matter of the current representation requires disqualification. And here, we have invoices -- and Dr. Benzeevi's declaration -- but invoices that show Ms. McDow communicated with HCCA and Dr. Benzeevi about Inyo, about the objectives of the MSA, about Chapter 9 objectives.

And furthermore, I will note again that the conflict waiver letters acknowledge and admit Baker's receipt of confidential information.

I'll move to imputation. The Debtor's opposition does not dispute the fact that if Ms. McDow is disqualified, so is Foley. Her conflicts and her duties are imputed to the entire

law firm. That's clear in current rule 1.10, and it's clear in the preexisting case law of the State of California. In particular, City and County of San Francisco versus Cobra Solutions, there is no -- there is not even an argument in Debtor's opposition that a screen exists that would somehow validly wall off Ms. McDow from others at Foley. So if Ms. McDow is disqualified, then also, too, must Foley be disqualified.

Looking now at the prejudice. There is a great deal of allegation and argument in Debtor's opposition about prejudice that would befall Inyo if Ms. McDow is disqualified. And to be clear, we only look at the prejudice suffered by the client who would lose counsel if there's been a finding of extreme (indiscernible).

Here, the side-switching adversity occurred in October of 2017. This disqualification motion was filed in October of 2018. In October of 2017, HCCA, through newly retained counsel, immediately put Ms. McDow -- and Baker, then -- on notice of their objection to her conflicted role and the request of her withdrawal.

So there's -- certainly Ms. McDow, and Baker at that point, were fully on notice of HCCA's

position that her conflict required her withdrawal. Furthermore, Mr. Bedoyan, in the fall of 2017, raised the issue of Ms. McDow's potential disqualification. When you -- if you have found a -- or made a finding of unreasonable -- I'm sorry -- of extreme delay -- and we've provided in our briefing numerous cases that show delays much longer than this one-year period that were not found to be extreme. But if there is a finding of extreme delay, the next step of the inquiry is to see whether extreme prejudice here would result to Inyo as a result of that delay.

And if we look at the Ontiveros versus Constable case, we see that the inquiry is really focused on the prejudice caused by the delay, not caused by a DQ motion in and of itself.

What is different by the filing of the motion in 2018 versus 2017? Has the case progressed? Is the case on the eve of trial? Have there been numerous litigation victories that the moving party is attempting to take tactical advantage of with a DQ?

Here, we know the case has not progressed much at all. There is no plan pending. We are told there will be no plan filed until after mediation,

hopefully resolving claims. We have a situation where I don't believe any credible argument, and certainly no credible evidence has presented, that any extreme delay would result to Inyo flowing from -- extreme prejudice would result to Inyo flowing from the alleged delay.

We have arguments that Inyo doesn't have money for other counsel. That's just an argument. There's no evidence to that effect. One has to assume that, but there's not even an argument that the state of affairs was different in October of 2017.

There is a highly speculative argument that without -- that if Ms. McDow disqualified, the bankruptcy would be dismissed. There's certainly no evidence to that effect. And there's absolutely no evidence or argument as to how that results from the one-year delay time period versus an earlier-filed DQ motion. These -- and there's even an argument that the hospital would have to close if Ms. McDow is disqualified. Again, there's no evidence for that, and there's no logical argument that that results from the filing of this motion in 2018 versus 2017.

This is a Court of equity, and the Court

has the right to consider the prejudice to Inyo that would result if Ms. McDow were to continue in this conflicted representation. General counsel for the Debtor has admitted a great deal of adversity and conflict. She has admitted conflict with respect to the MSA.

I find it ironic that in the opposition, the Debtor refers to the filing of the emergency motion to terminate the MSA as, quote, arguably adverse. But it's clearly adverse. The adversary action is clearly adverse. The Creditor's claims are adverse. There is adversity with respect to Tulare's claims, which directly involve Ms. McDow as HCCA's counsel, and involve HCCA administering MSAs.

But now we have Ms. McDow saying she will not be involved in any adversity towards HCCA and will not even participate in the global mediation that just a few months ago she was demanding that this Court order to occur.

One can wonder rightfully whether that is in the best interest of the Debtor. You've got general Debtor's counsel who is saying, "I will be in no way involved in the global mediation regarding multimillion-dollar claims. First off, she's a witness. She's already involved because, in arguing

for the order for the mediation, she made further arguments casting aspersions against my client.

But we have a -- we have a general Debtor's counsel who can't do many of the things now because of her conflicts that are necessary to move this case forward. She wants you to -- she argues that she is both simultaneously indispensable, and that without her, everything will fail, but that she won't be involved in any way in the most critical steps going forward.

I submit to Your Honor that --

THE COURT: Mr. Krueger, let me interrupt briefly.

MR. KRUEGER: Yes.

THE COURT: You've been speaking now for more than 20 minutes. I'm going to ask you to take no more than 60 seconds and bring us to a close.

MR. KRUEGER: Absolutely. I apologize, Your Honor. I submit, Your Honor, that there are multiple bases for the disqualification of Ms. McDow and that there are no bases for -- upon which that disqualification should be denied.

THE COURT: Thank you.

Ms. McDow, I'll hear from you, but before I do, I just have a couple of questions --

MS. MCDOW: Okay.

THE COURT: -- first one of which is I want to make sure that I understand the management services agreement. It had an initial term of five years and a monthly payment to HCCA of $65,000. Is that not correct?

MS. MCDOW: I think that is correct, Your Honor.

THE COURT: Okay. Second, I want to confirm the role of Mr. Shinbrot, who's on the line. He represents the Debtor in the adversary proceeding, correct?

MS. MCDOW: He does, Your Honor.

THE COURT: He is not counsel of record at this juncture with respect to the unresolved administrative claim for some $2.5 million?

MS. MCDOW: He is -- he is not, Your Honor, but he is the one who is handling -- it's a little bit strange, counsel of record in a Chapter 9 where there is not the typical employment application, Your Honor. But I think --

THE COURT: He's not of record, though, in that respect? That's still you?

MS. MCDOW: Your Honor, I think both Mr. Walter and Mr. Shinbrot, who are on the phone,

will represent to this Court that he was --

THE COURT: I'm asking for you to make representation --

MS. MCDOW: Yes. Your Honor, I am not handling --

THE COURT: That you are counsel of record on that part -- that's part of the main case, and you're counsel of record?

MS. MCDOW: Your Honor, for the Tulare piece, which I did, Your Honor -- when you say "the $2.5 million claim," that is being handled by Mr. Shinbrot.

THE COURT: Is he -- but that's in the main case. And you're the only counsel of record in the main case.

MS. MCDOW: Correct, Your Honor.

THE COURT: Okay. Next question. Plan preparation. That's you and not him, correct?

MS. MCDOW: Yeah. It -- to the extent that -- yes -- it doesn't deal with the HCCA adversary of Tulare, yes, Your Honor, correct.

THE COURT: Would you agree with respect to the emergency motion to terminate the services agreement -- I do understand that was emergency in nature, and that sometimes puts us into situations

that we have to act quickly, but difficult later. But we agree that your firm -- that you and your then-firm, BakerHostetler, represented both -- or at least in the immediate past had represented both Southern Inyo and HCCA at the time of that motion.

You had given the termination letter on September 29th of 2017; the motion's made October 17th. But the termination letter says, "We will commence termination." It doesn't say you "have terminated"; it says, "We will commence it," which makes -- and then it says, "We will give you a report of things that are pending."

From that, I am inferring that the actual termination was some non-specific date later, a reasonable time on the order at 30 days. From that, it looks to me like you were still counsel of record at that time in both. Is that not true?

MS. MCDOW: Your Honor, I was not the one who dealt with that specifically, but it's my understanding that it was terminated as of the time the motion was filed. But that's from --

THE COURT: Okay.

MS. MCDOW: -- me having discussions with --

THE COURT: Assuming that you were counsel

of record at that time, wouldn’t you agree that was an actual conflict of interest at the time of the termination motion?

MS. MCDOW: Assuming we're -- yes.

THE COURT: Okay. Go ahead with your argument.

MS. MCDOW: Your Honor, just -- and I will try not to reiterate at least the parts there in the motion to the extent that they have -- have been, I think, fully briefed and then some, but to break down what I believe is the real issues in this case, and then I'll pass, Your Honor.

The initial motion and the declarations primarily of Mr. Benzeevi that was filed that started this contested matter, Your Honor, presented a picture and, in fact, made attestations under oath that I had had daily if not more discussions with Mr. Benzeevi regarding all of his entities or many of his entities, and that the relationship was extensive, that confidential information had been imparted, and that it was a very elaborate relationship.

And I think I was fairly candid with this Court when I said that because it was some years ago, in some cases, 2014, that I wanted to make sure

that my recollection matched reality ion the sense of seeing whether or not that was actually the events and the relationship as Mr. Benzeevi had -- had represented it in his declaration, because it was not -- my recollection that it wasn't. But acknowledging that recollections can be faulty, he subpoenaed the invoices of BakerHostetler.

And I think it is very important, Your Honor, to actually walk through the only entries -- and again, keeping in mind that the representations made to this Court, and to me, for that matter, were that it was extensive, it was daily. And if you actually break down the invoices, Your Honor, there is, on December 28th, December 29th, and December 30th, which are the days before this petition was filed, that is what I will call the lion's share of the 32 hours that I spent over the course of eight years representing or doing any l services on behalf of HCCA, Your Honor. And again, that's the total of 32 -- 32 hours. So it is, again, just on its face, very different than what was represented, I think, to everyone.

But when you dig a little deeper, it's even a little more disingenuous because the 5.8 hours, 5.7, 11.5 hours on the 28th and 29th, Your Honor, do

not even mention the MSA, which, again, I think is -- it's fair to say is what movant's contend is the primary basis for the disqualification, or what should be.

And those entries are fairly lengthy, fairly detailed, and discuss nothing, again, about the management services agreement, state only that there was some research done regarding a filing by a public hospital, and meetings with the head of the bankruptcy group and Mr. Greene, who we know -- or who -- who is and was the relationship department with Mr. Benzeevi and Mr. Benzeevi. But again, those two entries, which are 11 -- my math is not the greatest -- but 11.1, give or take, mention nothing about the MSA.

If you then turn to the next large chunk, which is almost everything else that is the hours -- the services I provided to HCCA or any related entity, on 12/30/2015, I spent a total of 15.3 hours traveling to Lone Pine and attending the board meeting for Southern Inyo County Healthcare District.

Any mention of the management services agreement, that is -- again, was in line with what the -- the conflict waiver, and it -- what I, at

least, understood and what I had made very clear, and I believe that the members of my firm had made clear, was the purpose of what I'll call the dual representation for these two parties was to file the Chapter 9 on behalf of Southern Inyo. And again, that has -- that -- that entry has absolutely nothing to do with the MSA.

There has been a -- one entry on that in this time period, Your Honor, on 12/31. So the next day -- and I think that was the day before we filed or very closely -- it does say, then, "5.6 hours, a conference call regarding modifications to be made to the MSA." And it's also comprised of another portion regarding a closure plan that had been submitted by the board.

So hard to tell exactly how that's allocated, because we, again, don't have to submit the application, so it's not broken down, because I would typically break my time down. But suffice it to say that some portion of the 5.6 was split with issues regarding the closure plan.

And then, the only other reference to the management services agreements in this is on January 1, 2016 -- again, that is the day, I believe -- or the day before that we filed -- and it's very

similar to the last entry on our -- it's discussing the additional modifications being made to the management services agreement, which was well within the ambit of the conflict waivers. And we'll get to those in a little bit, at least, more of the substance, and I think the import of them. But that being said, again, that -- those are the two entries.

And then, if you focus on the remainder of the time -- and again, makes up my 32, 37 hours over the entire course of, again, seven years, I think counsel said, that the 8 hours or so remaining are to a matter having nothing to do with -- it was before -- at least as I understand -- before Southern Inyo was a glimmer in anyone's eye, whether HCCA's eye, my eye. I certainly had no understanding in 2014 that this would ever be a client, that it was going to be someone that Mr. Benzeevi wanted to deal with. And I don't believe that Mr. Benzeevi had that thought either. So that is in, again, 2014, and that is, again, the -- the lion's share of the balance, 578, give or take, talking about an agreement with Tulare.

So, again, Your Honor, just before delving into it, I'll say is how -- the fact that I think

they've fallen woefully short of demonstrating that there is a substantial relationship between what I'll say the two matters -- I think it's important to really break down what it is we're dealing with.

The -- I guess the next piece -- and I'll take them a little bit out of order in the hopes of being as succinct and as brief as I can -- but what movants do a great deal of in their papers and their argument today is to assert what they believe to be claims on behalf of either Southern Inyo or Tulare as some sort of justification for why their -- why we should be disqualified.

And quite candidly, the -- those are claims to the extent that they exist for either of those parties. Mr. Walters is a very fine lawyer. To the extent he believes those exist, I believe those are his to assert. And certainly on behalf of Southern Inyo's, the extent they think there is a conflict, a disqualifying conflict that they believe impairs my ability or otherwise harms their interests, they have always been free and are free to do so. And it's not as if anyone has been shy about telling them in every which way from Sunday how we think, you know, their interests have been harmed by my actions.

So, again, the -- the paper spends a fair amount of time arguing why my duties to -- again, Tulare is no longer a client, so fully -- same issue there, had a very limited role -- setting that aside because of the substance -- but that is, I think, in opposite and not relevant at all to whether or not movant's motion has any merit and should be granted.

So, Your Honor, if we turn, then, to what I think is really -- should be the focus of today's hearing is whether or not I had confidential information and whether it's presumed because of a relationship and it -- whether there was a substantial relationship such that it has to be presumed or whether I have actual knowledge of confidential information.

The movants, although they have made conclusory statements that I have actual knowledge, I haven't seen any specific evidence on, and it wasn't provided in the reply about confidential information that I obtained from HCCA or from any related entity that has -- I will say -- been used against them for lack of a better word. And I think this points -- it really has been, I think, swept under the rug, so to speak, in part by me, that the issue, again -- if the movants really take issue

with this -- that the MSA -- that I assisted in drafting it -- again, they -- they made it seem as if I had drafted it from beginning to end, a very comprehensive document.

Let's see. I spent, I don't know, 12 hours, I think, total looking at it. That being said, either way, that agreement, Your Honor -- nothing that I could have obtained -- even if we were to assume that I learned each piece of confidential information, there is nothing regarding --

THE COURT: But don't your bills say you negotiated it?

MS. MCDOW: Your Honor, the two entries I just read -- I read what they say, Your Honor.

THE COURT: Don't they say you negotiated it?

MS. MCDOW: I think that is the word they use, or a synonym. It's --

THE COURT: It -- no. That's your word in your bill, isn't it?

MS. MCDOW: I think so, Your Honor. I'm happy to look, but I think the word is "negotiated."

THE COURT: Okay.

MS. MCDOW: And, Your Honor, I'm not -- I

don't think I have ever taken the position that I wasn't involved in it. I think I --

THE COURT: I understand, but it's more than reviewing a draft. You're actively negotiating. That's your word, isn't it?

MS. MCDOW: I -- Your Honor, I think so. I mean, I'm happy to look. I think negotiated is a fair representation of what I did, even if that weren't --

THE COURT: Okay.

MS. MCDOW: -- the word, I used, Your Honor. But that, again, was under the notion that, that was the -- again, what the conflict waiver specifically contemplated, it was done at the same time.

But I think, again, Your Honor, the focus in looking at what information I was said to have obtained and how I used it, which is what the notion of disqualification and the attorney-client privilege is and the sanctity of what it is we do when we get up every day is the focus of whether I misused that somehow.

And if you really break that down -- again, let's assume that I did draft it from beginning to end -- I spent 100 hours on it; I learned

everything. But the very fact is that the declaration that, again, is the basis for their relief, and I think that, you know, the beginning of the end, so -- as it were -- did not rely on any confidential information, that we --

THE COURT: Well, yeah. But you still have the duty of loyalty and that continues. Mr. Krueger is right. It doesn't terminate with your cessation of termination. You have a duty of loyalty that extends to the grave.

MS. MCDOW: Yeah. I understand, Your Honor. So it's -- again, I'm separating the two right now, and I'm happy to go out of order. But when we're focusing -- the duty, again, that they focus on -- and the loyalty, I think, is a separate issue, and I think it's less forceful for them, if that makes sense -- is that their contention is that I used confidential information -- which, again, they can't specify at all.

And I believe they have the burden to specify it, and they don't. They make conclusory statements that I have it. I don't think the bills support that I got confidential information, and certainly not in the actions that they say were adverse. And by that, I mean the entire action they

say was the beginning of the end was that I made a declaration regarding the bank statements.

It is very important, I think -- certainly to the adjudication of this motion -- that the bank statements didn't contain any confidential information. There's nothing in that declaration that even sort of could be interpreted as something confidential I learned from HCCA or any entity, assuming I ever learned it, and used against them. Rather, I was put in a very tough situation, that I -- that -- as I was reviewing, and I thought there -- if I could go back and I had not been the one who had reviewed those bank statements, how much easier my life would be. But the truth is, I was the one. And I was put in the impossible situation of I now believe that there is going to be harm to the other client, and I have to take action that I think will --

THE COURT: I agree. The emergency motion is an emergency motion, which means it's on short notice, and it does put you in a tough spot. And sometimes we have to do the things we have to do, but it may -- by accepting two clients that are involved in a business transaction together, by working on those, you may be setting yourself for an

inevitable disqualification, if there's a dispute, and there was.

And so maybe you did, in fact, have to make the motion you made. And maybe that's even consistent with your duties to Southern Inyo was to get them out of this, but you fall on the sword. And no one is passing judgement on your actions and saying you're a bad person or bad lawyer. But we're saying -- I think what Mr. Krueger is saying is but you shouldn't be allowed to continue after.

I mean, I don't know that the rules of professional ethics necessarily imply a moral evil. It's the question of drawing some lines about what is good and bad practice and acceptable to protect clients. And maybe, in fact, you painted into a situation where you had to do what you had to do by making an emergency motion, but it also inevitably spells the end of your representation in the case, simply because now you're in an impossible position.

So I don't think he's saying you're evil. I think he's saying your history with both clients, now in a dispute, preclude you from going forward for Southern. That's where I think the problem is.

MS. MCDOW: And, Your Honor, again, I would say, for a myriad of reasons, that, that isn't the

case. Again, if we --

THE COURT: Okay.

MS. MCDOW: If we break it down to, again, the 10-1/2, 11-1/2 hours that even mention the MSA and whatever extent I had with doing that, the -- the unavoidable fact is that we're not -- there's nothing in that declaration that I think that Movants could point to, have pointed to that suggests that I used any confidential information. Duty loyalty, I think, is a different issue, but that's not been their point. Their point has been that I used confidential information that I obtained in these discussions and these meetings, again, which I think the actual admissible evidence shows never occurred. That there was no confidential information. There was facts, and they were presented to the Court. There is nothing in there to suggest that I had some secret knowledge that I was now using against that clients. I don't think that's -- I know that's not the case, and I don't think that they even believe that, that is the case. So again, that's with respect to the MSA and, again, what I -- what I will call the primary basis for their motion.

And if we take that a step further, Your

Honor, the rules requiring the governing case law requires that, that then must be substantially related. And I know there's a ton of case law. Your Honor has read it. I know Your Honor reads and puts a lot of thought into it before, so I won't rehash what the elements are.

But I think it is very, very important when all the issues are really broken down, which is, again, the MSA that they say that I spent, again, forever and a lifetime negotiating. It was really 11 hours. That being said, it was limited to that, and otherwise, it's not even limited to this case or to Southern Inyo. And there's also an employment matter. That's the other piece that I forgot. Otherwise, there is nothing they could even point to in seven years, other than those 11 hours that relate to anything now.

So if we are looking at substantially related, I think we really have to focus on, okay, I helped negotiate for 10-1/2, 11 hours this MSA. The MSA is no longer alive and well. We can say that whether or not that --

THE COURT: Right. But at $2.5 million administrative claim is alive and well, and your counsel of record in the main case; and it is the

main case or part of it.

MS. MCDOW: Your Honor, I apologize. That was for the Tulare. That's what I was trying to clarify. I thought you were talking about $2.5 million Tulare claim.

THE COURT: Okay.

MS. MCDOW: I apologize. I am certainly not counsel of record for anything HCCA. So I apologize. I'm glad we're -- I thought we were talking about Tulare's $2.5 million claim. I have --

THE COURT: Isn't there a claim by HCCA, and wasn't it 2.5? Did I get --

MR. KRUEGER: I believe --

MR. BEDOYAN: And also by VI.

THE COURT: But I thought that $2.5 million administrative claim that we were haggling about was for HCCA. Is it not?

MR. KRUEGER: Yes, Your Honor.

MR. BEDOYAN: There is also one by Tulare.

THE COURT: There is. But I'm talking about the HCCA claim. Isn't -- that's unresolved. Is it not?

MS. MCDOW: Your Honor, it was filed --

THE COURT: But there's not been a

resolution of it.

MS. MCDOW: It was not properly brought before the Court, so it's been withdrew.

THE COURT: It's not withdrawn. It remains unresolved. Is that not true?

MR. BEDOYAN: Correct.

MS. MCDOW: I don't know technically, Your Honor, because Your Honor issued an order saying it's not proper. So I think it's withdrawn of sorts. Your Honor said that it was not properly brought with a motion to approve an administrative claim, and nothing has been done at this time.

THE COURT: We have this administrative claim that is unresolved. Are you telling me it is resolved?

MS. MCDOW: Well, Your Honor, it's just not before -- I think --

THE COURT: It hasn't been scheduled for -- for a hearing.

MR. BEDOYAN: It hasn't been noticed for a hearing.

THE COURT: But it's --

MR. BEDOYAN: But there is still an administrative claim on file. It just hasn't been noticed --

THE COURT: That's what I thought.

MR. BEDOYAN: It's not before the Court.

THE COURT: Correct. But it's a part of the clerk's record and at some point will have to be resolved, will it not?

MR. BEDOYAN: And it hasn't been withdrawn.

THE COURT: And isn't the number 2.5? Do I have it wrong?

MR. BEDOYAN: Yes. One of the two.

MS. MCDOW: Your Honor, that is expressly being handled by Mr. Shinbrot. That is not.

THE COURT: Well, except for the fact that he's not counsel of record in the main case. You're the counsel of record.

MS. MCDOW: Well, he is -- again, Your Honor, I think the counsel of record is a little bit of a misnomer in a Chapter 9 where there is no --

THE COURT: I'm not saying you're employed by the Debtor or the Trustee. The clerk's records shows Ashley McDow and Foley & Lardner as counsel of record in the Chapter 9. So you're of record for all matters in the 9. Are you not?

MS. MCDOW: Yes. Except those that have been specially designated to Mr. --

THE COURT: Is there anything in the

clerk's record that shows that you're not of record for the Chapter 9 for this unresolved administrative claims?

MS. MCDOW: No, Your Honor. But unless I'm mistaken, that's a simple filing issue. I don't think there's anything to be filed in a 9 to change counsel of record. I may be wrong. I don't --

THE COURT: Well, the clerk -- the clerk -- the clerk disagrees. He, Mr. Blackwelder, only knows people to be of record who have filed something in the case. I don't have to approve your employment or Mr. Shinbrot's in Chapter 9. It's absolutely true. But from the standpoint of the clerk of the Court who he, in this case Mr. Blackwelder, acknowledges is counsel of record, it's Ashley McDow and Foley & Lardner, is it not, for all parts of the Chapter 9, as far as the clerk is concerned?

MS. MCDOW: Yes, Your Honor. But I don't know how I would change that, if that makes sense, to identify which --

THE COURT: Okay.

MS. MCDOW: -- matters --

THE COURT: Go ahead. And, Ms. McDow, now you have also reached the 20-minute mark, so I'm

going to ask you to take no more than 60 seconds and wrap this up.

MS. MCDOW: Okay. Your Honor, so again, to to back to the piece which is the substantial relation. There is -- there is nothing more. And the way that the parties present it is that I was reactive, and in fact, quite the contrary is true. As soon as the -- what I believe the emergency that presented itself was resolved, we sought independent counsel. I advised the District that they needed to seek independent counsel. All of those things have been proactively handled. Mr. Shinbrot was proactively. It's not as if I have or the District has been reacting and waiting for someone to alert a conflict. And everything that would possibly be tangentially -- may be related to the MSA, which I believe is nonexistent now as far as the main case --

THE COURT: Other than this administrative claims that remains unresolved.

MS. MCDOW: But again, Mr. Shinbrot is handling that exclusively, Your Honor. I'm not sure how I would file something with -- with the clerk to reflect that. I'm happy to do so. I just didn't know that, that would be done or how it would be

done to be a notice of a representation. I really don't know in a Chapter 9 -- so I apologize, Your Honor -- what that would look like because he is handling other pieces within it too. I just don't know how that would be filed with the Court.

But again, Mr. Shinbrot, I am sure, will represent to the Court what his engagement agreement says and what the scope of his representation is, and I'm happy to, again, file something clarifying it with the clerk. But I was unaware that, that was necessary.

So again, Your Honor, we have taken proactive steps to make sure that there is no conflict, no apparent conflicts, no potential conflicts with any remaining issues that we believe even tangentially relate to the MSA.

Other than that piece, Your Honor, which is the claim, which is tied in with the adversary proceeding, there are no other issues that relate to HCCA at all or to -- certainly to the MSA but to HCCA.

Again, any actions or discoveries that are part of the claim against them, Mr. Shinbrot has been handling exclusively. I've had zero part in that, deliberately so. And there is -- there is

nothing that I am participating in, in that regard, Your Honor.

THE COURT: Thank you. I'm not going to take reply. I'm ready to rule on this. My findings will be extensive.

These are the Court's findings of facts and conclusions of law as required by Federal Rules of Civil Procedure 52, as incorporated by Federal Rules of Bankruptcy Procedure 705.2 and 901.4(c).

Summary of the facts. Dr. Benzeevi, B-e-n-z-e-e-v-i, is a board certified emergency medicine physician. Between 2009 and 2017, he employed the Baker & Hostetler firm, which I will colloquially refer to as the Baker firm to represent his interests. Over the years, he employed the Baker firm to perform a number of legal tasks on his behalf, and it has been rightly said that Baker served as a de facto house counsel for Dr. Benzeevi.

Using the Baker firm, Dr. Benzeevi formed a number of different medically-related corporations and entities, Healthcare Conglomerate Associates, LLC, which we refer to as HCCA, and who is a principal player in this dispute, Medflow PC, VI Healthcare Finance and Tulare Asset Management. And I, like the parties, collective refer to these as

the Benzeevi Group.

At the Baker firm, the majority of Benzeevi Group work was undertaken by an attorney named Bruce Greene, partner in the Baker firm. But some of the Benzeevi Group's work was also performed by Ashley McDow, then a partner at the Baker firm.

Southern Inyo Healthcare District operates a hospital, and found itself in financial difficulty, and in late 2015 approached the Baker firm about a Chapter 9 bankruptcy. And in fact, the District, the hospital district, fired the Baker firm to do just that.

In December 2015, Baker, acting largely through McDow, negotiated the HCCA -- excuse me -- negotiated to undertake certain management duties on behalf of the District. The District was represented by Scott Nave, N-a-v-e, or Nave, who was employed by a different law firm. Ms. McDow attended the District's -- the hospital district's board meeting, at which the management services agreement or MSA was approved.

The MSA provided a substantial piece of work for HCCA, extending with an initial term of five years and $65,000, which this Court believe to aggregate some $3.9 million for the initial term.

Ms. McDow personally spent no less than 37 hours "advising HCCA on the management services agreement and potential Chapter 9 filing by Southern Inyo Healthcare District." Opposition 5:10 and 11 filed February 20, 2019, at number 589.

On January 2, 2016, the Baker firm sent HCCA the hospital district a waiver of conflict. A signed copy is attached to the motion or to the reply documents as Exhibit RR. The January 2nd is the date that it was sent by the -- or dated by the Baker firm, but it does not indicate what date it was signed by the clients.

Also on January 2nd, HCCA and Southern Inyo Healthcare District entered into a management services agreement. This is Exhibit A to the motion.

On January 4, 2016, Southern Inyo Healthcare District filed Chapter 9. That case remains pending.

The Debtor has filed and then withdrawn three plans. The case is more than three years old. Early in this case Southern Inyo Healthcare District sought, and this Court granted, approval on the MSA.

In the summer of 2017, Dr. Benzeevi asked the Baker firm to form VI Healthcare Finance to

provide financing for the hospital district and the Baker firm did that. As a part of that process, Baker & Hostetler asked Southern Inyo Healthcare District, Dr. Benzeevi, HCCA, and VI Healthcare Finance to sign another conflict waiver. That is Exhibit D. That is a letter dated July 19, 2017, and it was signed by Dr. Benzeevi and HCCA.

Both of the conflict waivers expressly state that as a part of Baker's representation it has received "confidential information" about the Benzeevi Group. In the summer of 2017, a dispute arose between HCCA and Southern Inyo Healthcare District. Allegations by the hospital district included serious financial improprieties by HCCA.

On September 29, 2017, and without warning, the Baker firm notified the Benzeevi Group that it was undertaking the termination of their representation. "We must commence the termination of representation." "And commencing today we will no longer undertake any new matters." The letter also promised a report of "pressing matters" to the representation.

From the words "commencing termination" and from the absence of a firm cessation date, the Court infers the cessation date to be thereafter, probably

some reasonable but unspecific period of time by which the Baker firm would finally wind up and cease its work. The Court kind of assumes it's probably 30 days plus or minus. But the letter didn't say. It talks about commencing termination and does not give a firm date.

On October 17, 2017, which is still within what is the apparent period, based on my inferences of the period of Baker's representation of HCCA and after only a few hours' notice to HCCA, the hospital district moved for, and this Court heard and granted an emergency motion to terminate the MSA. It was supported by the declaration of Ashley McDow, Docket 326, and included allegations that HCCA had misused and misappropriated hospital district funds. That is Exhibit S in support of the motion.

Ms. McDow amplified these comments at the hearing on the motion, Exhibit G in support of the motion. For example, she stated that HCCA, who worked for both the Tulare Healthcare District, which is another hospital also in Chapter 9 before Judge Lastrato, or has been, transferred "millions back and forth between the two entities." The Court granted the motion and terminated the MSA.

HCCA has filed a request for administrative

expenses of some $2.5 million, which remains unresolved. Ms. McDow is counsel of record in the Chapter 9.

The District has employed other counsel to prosecute an adversary proceeding against HCCA as a result of the alleged wrongdoings arising out of the MSA.

No Chapter 9 plan has been confirmed or is now pending. The parties have discussed resolving. disputes or at least have considered doing so by mediation, but to date that has not occurred, at least to this Court's knowledge.

HCCA contends and Ms. McDow disputes that the allegations of conflict of interest, which include possible disgorgement of fees and malpractice by Ms. McDow and/or the Baker firm, give those entities too large a stake in the mediation to allow a conductive -- or a productive settlement meeting by the parties.

In 2018, Ms. McDow left the Baker firm and switched her affiliation from Baker to another firm, Foley & Lardner, substitution with the clerk's records fall in June 2018.

Procedure. HCCA and VI Healthcare Finance have moved to disqualify Ms. McDow and Foley &

Lardner. They have not moved to disqualify associated affiliated with this case as this Court calls, making appearance Mr. Delaney and Mr. Farivar, and so the Court intends to rule on the motion as it was pitched, limiting the requested relief depending on this Court's findings to Ms. McDow and Foley & Lardner. Ms. McDow and Foley & Lardner oppose the motion.

The law. The bankruptcy court applies the California Rules of Professional Conduct. We know this from Local Rule 180 from district court, which is incorporated in the Bankruptcy Rules by 1001-1(c). The Rules of Professional Conduct were substantially revised effective November 1, 2018. At least for the conduct that occurred before November 1, 2018, this Court applies the former Rules of Professional Conduct because they were the ones in place at the time of the alleged violations.

But in some instances, the new rules and/or the comments to those rules provide further understanding of the old rules and have carried forward certain doctrines and principles, and the Court will consider them as persuasive authority.

Moreover, there is, as Mr. Krueger notes, a forward-looking component to the motion in that

there is an ongoing issue that proceeds, particularly any ongoing taint of Ms. McDow and Foley & Lardner and will also consider the new rules as to the disqualification, considering the receipt of confidential information and loyalty that occurred after November 1, 2018.

The former rule that governed this was Rule 3310 of the Rules of Professional Conduct.

Definitions. Subdivision(a) of that rule provides disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonable foreseeable adverse consequences to the client or former client.

"Subdivision(a)(2) of the definition section says informed written consent means the client or former client's written agreement to the representation following written disclosure."

Subdivision(a)(3) provides that written means any writing as defined in Evidence Code Section 250.

Concurrent representation. Subdivision C(2) of 3310 says that, "A member shall not, without the informed written consent of each client subpart(2), except or continue to represent -- continue representation of more than one client in a

matter in which the interests of the clients actually conflict."

Successive representation is governed by 3310(E), which says, "A member shall not, without the informed written consent of the client or former client, except employment adverse to the client or former client where, by reason of the representation of client or former client, the member has obtained confidential information material to the employment."

The current rules, current rule 1.7(a), subdivision(a) prohibits direct adversity. Subdivision(b) -- excuse me -- (b)(3) -- prohibits taking a position contrary to clients in the same litigation.

Former client representation, as governed by new Rule 1.9, and the imputation rule -- very significant in this case -- is Rule 1.10. As pertinent here, it state, subdivision(a): while lawyers are associated in a firm, none of them shall knowingly represent the client when any of them practicing alone would be prohibited from doing so by Rules 1.7, the concurrent representation rule, or 1.9, the former representation rule, unless:

Subpart(2), the prohibition is based on

Rule 1.9(a) or (b), the former client rule, and arises out of the lawyer's -- the prohibited lawyer's association with the prior firm, and the prohibited lawyer did not substantially participate in the same or substantially related matter;

Subpart(2). The prohibited lawyer is timely screened from any participation in the matter and this portion, no portion of the fee therefrom; and

(3) Written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include the description of the screening procedures employed, and any agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures;

And then subpart(C). A prohibition under this rule may be waived by the affected client under the condition stated in Rule 1.7.

Discussion. Concurrent representation problems as to Ms. McDow. The concurrent representation problem. Ms. McDow represented HCCA and Southern Inyo Healthcare District and/or her firm between December of 2015 and the fall of 2017.

There was a termination letter sent September 29, 2017. But referring to the commencement language, I assume that there was at least a 30-day incubation period on them, based on the wording of that letter.

In the summer of 2017, a dispute arose between HCCA and Southern Inyo Healthcare District about HCCA's actions under the management services agreement and made particular and very pointed allegations of wrongdoing. And that potential conflict of interest described in Bruce Greene's conflict letters ripened into an actual conflict of interest under Rule 3310(c).

Moreover, Ms. McDow took an active role in the dispute when she made an emergency motion to terminate the MSA, including declaration and comments appearing -- alleging serious improprieties.

But even before that, in late September 2017, the Baker firm dropped HCCA, implicating the -- or invoking the hot potato rule, which is itself a violation of the duty of loyalty - citation to *American Airlines versus Sheppard Mullin*, 96 Cal.App.4th 1017 at 1037 and 1044. It's a 2002 case.

Absent an informed written consent,

disqualification is, per se, an automatic. *Flatt versus Superior Court*, 9 Cal.App.4th 275, 284, a 1994 case.

As to Foley & Lardner on the concurrent conflict issue, the law is less clear on disqualification under 3310(c)(2) as to whether it should be imputed to Foley & Lardner.

But first, I find that the firm merger cases are persuasive authority on this issue and find grounds to disqualify Foley & Lardner. *Picker International versus Varian*, V-a-r-i-a-n, *Associates, Inc.*, 896 Fed -- I think it's a series, but I omitted the number -- 578 at 582, and 3 -- it's Fed. Circuit 1989; *Stanley versus Richmond*, 35 Cal.App.4th 1070 and 87, 1995 case; *Western Sugar Cooperative versus Archer-Daniels-Midland*, 98 F.Supp.3d 1074, 1084-5, Central District California in 2015.

Second, since the imputation for disqualification is a forward-looking issue, it is appropriate to apply Rule 1.10 of the new rules to this analysis, and applying that rule would impute Ms. McDow's qualification for Foley & Lardner, absent exceptions do not apply.

Accordingly, I find that under this

analysis, absent an informed written consent, Foley & Lardner should also be disqualified.

As to the successive representation, starting with Ms. McDow, Rule 3310(e) has four elements. One, prohibits the representation of another client in the same or a substantially related matter.

Two, the attorney obtained confidential information

Three, the interests are materially adverse.

And four, absent informed written consent.

The ethical rules are, of course, concerned with confidentiality and loyalty.

As to the first element, these are the same or substantially related matters. They are the termination of HCCA's agreement with the District. This ended in litigation. And though there have been other counsel employed to handle that -- the adversary proceeding, we still have the motion to terminate, which is completely done, and for which there is no fixing, as far as I can tell, and the resolution of some administration claim of some $2.5 million.

I do find the first element satisfied. I

also note the authority cited by Mr. Krueger and note comment 1 to the new Rule 1.19 indicates that a lawyer "could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client."

Two, confidential information. We know this to be true by virtue of the January 2, 2016, conflict letter from Bruce Greene, plus the fact that Ms. McDow spent some 37 hours working on their settlement agreement and at the same time counseling HCCA with respect to the implications of a possible filing by the District.

Moreover, this Court notes that Ms. McDow's involvement was direct, spending some 37.5 hours, and appearing at the board meeting. Confidential information is presumed to have passed. *Jessen versus Hartford Casualty*, 111 Cal.App.4th 698, 709 -- it's a 2003 case; *City and County of San Francisco versus Cobra*, 38 Cal.4th 839, 847, 2006 case.

Number three, the material adversity requirement is satisfied. We have the termination of the agreement, we have the administrative claim, and ultimately what will need to be a plan that will sort this out in which the clients have divergent

interests.

Fourth, as to the conflict waiver, I will comment on that in a moment.

As to Foley & Lardner, at the quashal hearing on the subpoena, the Court cited various rules about vicarious -- cases about vicarious disqualification described in *Adams versus Aerojet*, 86 Cal.App.4th 1324 and 1339, a 2010 case.

The client, DeNatale firm, correctly reminds me that this line of cases is then inapplicable in dealing with the double imputation problem, not that of direct involvement in court. Thanks for correcting me on this issue.

This is correctly analyzed under new Rule 1.10, which disqualifies the whole firm and is the same analysis as in the concurrent representation analysis I spoke of a few moments ago.

Absent appropriate waiver, the Foley & Lardner firm would be vicariously disqualified as yet.

I do not find a cure by association of counsel. One, as to the motion to terminate the management services agreement. The damage has already been done. It is true that these were an

emergency -- this was an emergency situation. And it may well be that Ms. McDow did the only thing available to her, but by doing so has ensured that this rule is in play against her.

But when a lawyer undertakes the representation of more than one client in a matter, it acts at its own peril when there is a dispute that is involved.

Two, there is an unresolved administrative claim for $2.5 million and no separate counsel for that.

Three, we are going to need a plan on this. And Section 901 tells us that 1129(a)(9), the administrative plan rules in Chapter 11, do not apply, but places the District in an adversarial role with HCCA.

The District wants their claim to be as small as possible and spread out, and of course, HCCA would like it as large as possible and paid rapidly.

The waivers. What about these waivers? I find the same problem with each and find them ineffective, lacking full disclosure and that they were not informed, for several reasons.

First, each speaks of interests that are,

quote, presently aligned, and says that in the future, an actual conflict could arise and that the firm will then reevaluate this.

New Rule 1.17, comment 10, and old rule 3310(c) each contemplated that if a situation changes, a new conflict waiver must be signed to be effective. And the situation did here -- change here. It was a potential conflict that became actual and very concrete and, frankly, somewhat acrimonious.

So in 2017, the firm's -- the situation changed. We do not have new waivers. So I find the two waivers signed to be ineffective at the time of the dispute.

Number two, the waivers did not disclose the actual and foreseeable consequences. That is, that the firm would choose to represent the District over HCCA if a conflict arose. That was not mentioned and should have been.

Number three, it was untimely. The concurrent representation of the clients began in December of '15, and the waiver was not transmitted by the Baker firm until January 2nd. So it was late, and we don't know when it was signed.

And fourth, I find insufficient evidence of

circumstances surrounding the waiver, and in particular, Dr. Benzeevi's time to reflect on it. For example, the first waiver, the Baker & Hostetler letter of January 2nd appears, and the narrow settlement agreement, appear to be signed the same day, and perhaps even simultaneously. And I'm not convinced there was appropriate time for reflection. That is not a part of the rule, but it talks about informed consent. And I don't know how, if you're handed a stack of papers, you can give informed consent to an agreement and waivers that go with it. I am not convinced that there has been an adequate showing of it.

So I am granting the motion as to both Ms. McDow and to Foley & Lardner. There has been no request to disqualify any of the associates, Mr. Farivar or Delaney, so I'm not granting that. I am delaying implementation of this to May 10th to avoid leaving the District with no counsel in the short run. If not, I am ordering the clerk to substitute the District pro se, and it is unquestionable that an order to show cause for dismissal will follow, given the fact that entities cannot appear without lawyers.

So I am giving the District some 30 days to

resolve this issue. And if they do not do so, the clerk will make an adjusting entry, and it will almost certainly result in disqualification. I have signed the order. I'm handing it to my deputy, and I am instructing her to file it and have it served on the entire matrix.

Anything further before we turn to the status conference?

ALL: No, Your Honor.

THE COURT: With regard to the status conference -- I'll give the parties time to talk -- but it is my intention to issue an order to show cause for dismissal. I realize that I have just disqualified counsel, so I'm going to give you a long period of time to deal with it, some 90 days. But I was going to continue the status conference to July 24th at 1:30, to give the District time to find new counsel and to get things moving again, and then to require opposition from them by July 10th.

And if there has been an insufficient showing or no written opposition, it is my intention to give an order to show cause for dismissal to this case under subdivision -- excuse me. This will lay this out. There's been three years' elapsed time and no plan. And so my problem here is this has

gone on a very long time, and I can't tell that we are making appropriate progress.

I am cognizant of the fact that I have just issued a disqualifying order, but I am going to -- so I'm going to give you a long time to -- for the District to resolve it. But unless they can make forward progress substantially, there will be a dismissal of this case.

If I am satisfied that there is substantial progress, I will probably give the District more time, but it's going to be discretionary; and the District to move this case along.

Anything further, before I conclude the status conference, by any party?

SEVERAL: No, Your Honor.

MS. MCDOW: Can you give the dates again -- I apologize -- for the opposition?

THE COURT: Sure. It will be in the order which I will give to my assistant here momentarily. Continued date of status conference is July 24th at 1:30. Opposition by the District by July 10th.

MS. MCDOW: Thank you.

THE COURT: Thank you. Anything further?

MR. KRUEGER: No, Your Honor.

MR. BEDOYAN: No, Your Honor. Thank you.

THE COURT: Very well.

(Hearing concluded)

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I, Court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Julie Thompson April 16, 2019

Signature of Approved Transcriber Date